

## Compte rendu

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par James J. Brudney

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most workers to make a choice to certify an exclusive agent, the only alternative they are now offered is surrendering complete control of the employment relationship to their employer. With regard to that choice, governments are neutral. They do not actively promote collective bargaining despite having promised to do that in the international arena.

Union responses varied. Most unions had not yet formulated a concrete policy but Adams found that two unions – United Food and Commercial Workers (UFCW) and National Union of Public and General Employees (NUPGE) – had initiated a “labour rights are human rights” campaign. They have now been joined by the Canadian Professional Police Association and the Canadian Teachers Federation. Adams also found that a few unions were concerned that a policy designed to encourage people

to organize either within or outside of the certification system would result in a proliferation of company unions. Adams recognized that as a possible problem, but argues that it is a controllable one. It is interesting to note, as Adams points out, that the Canadian Labour Congress (CLC) unanimously endorsed a set of labour rights resolutions put forth by NUPGE/UFCW and that New Democratic Party leader Jack Layton has agreed to put the “labour rights are human rights” message on the public agenda.

Adams has done a remarkable job of bringing to our attention a very important issue in labour policy and human rights. The book is short and worth reading by government policy makers, academics, graduate students and concerned business and labour union leaders.

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***Workplace Justice without Unions,***

by Hoyt N. WHEELER, Brian S. KLAAS, and Douglas M. MAHONY, Kalamazoo, Mich.: W.E. Upjohn Institute for Employment Research, 2004, xii + 229 pp., ISBN 0-88099-313-8.

This valuable book explores at an empirical level the status of job security protection available in the American workplace. The United States is unusual among advanced post-industrial countries in that it provides no comprehensive standard of protection against unfair or arbitrary dismissals. The American rule of employment-at-will remains in place, notwithstanding limited exceptions derived primarily from federal antidiscrimination statutes and recent developments in state tort and contract law. Unionized establishments address job security through “just cause” provisions negotiated in collective bargaining agreements, but the steep decline of unions has meant that this too is a limited option.

As the authors note, employers have rational economic grounds for wanting

to minimize the prospect of arbitrary or unfair dismissals: they include attracting and retaining productive employees, reducing litigation-related costs, and keeping unions at bay. The book focuses on various approaches employers have developed to provide some form of due process to employees facing termination. The authors seek to assess how these employer-designed processes of workplace justice measure up when compared with labour-management arbitrations, civil jury trials, and even labour court judgments in other countries.

These are important questions: workplace justice procedures in non-union firms encompass 92% of the private sector workforce. The most celebrated and controversial procedure developed

by employers, to which the authors devote principal attention, is employment arbitration. As a result of several Supreme Court decisions, employers are now able to require as a pre-condition of employment that all job-related claims be presented to an arbitrator rather than a court. Many employers have moved in this direction since the early 1990s. The authors also evaluate more informal employer procedures such as review of worker complaints by peer review panels and by human resource managers.

Treatment of employment arbitration includes an analysis of the reasons for its growth, and the policy arguments for and against its use. The authors attribute the recent popularity of employment arbitration to employers wanting it and the federal government (especially the Supreme Court) encouraging it. Importantly, neither of these reasons is employee-driven. The authors' review of the extensive literature arguing pros and cons is nuanced, but adds little that is new. Indeed, their formally neutral conclusion recognizing "powerful arguments on both sides" seems a bit evasive. The soft treatment of key employee-related disadvantages (employers as the only repeat players; lost access to jury trials; private nature of arbitration processes; lack of meaningful judicial review) may reflect a desire not to allow the normative controversy to distract from their empirical contributions.

Those contributions begin in chapter three with a review of existing studies on how workers have fared under employment arbitration and other dispute resolution systems. The authors are sensitive to the difficulties of comparing win/loss rates or amounts recovered when examining employment arbitrations that involve either employee statutory rights (contrasted here with court cases involving such rights) or employee rights under employment contracts and personnel manuals (contrasted with labour arbitration cases). The authors end up withholding judgment due to

dissimilarities in subject matter, settlement rates, the effects of protracted proceedings on amounts owed, and other factors.

However, the authors' own in-depth survey of 176 experienced employment arbitrators yields some more definitive results. One finding, not unexpected, is the arbitrators' perception that employers are significantly more likely than employees to have competent representation. Another is that unlike typical just cause provisions of labour agreements or unfair dismissal statutes, which require the employer to prove a proper reason for termination, nearly one-third of employer policies require employees to prove a violation of their rights—and employees' win rate in these latter employment arbitrations is much lower than when employers bear the burden of proof. Finally, most employment arbitrators surveyed would not overturn a dismissal for violating a clearly unreasonable rule (something labour arbitrators do almost uniformly), while a substantial number of these arbitrators regarded employer good faith as a defence to a dismissal claim (something labour arbitrators do not endorse).

In an effort to assess outcomes comparatively by focusing on similar circumstances, chapter five reports results based on 12 hypothetical employee dismissal cases developed by the authors. These 12 cases vary in a number of respects, including the nature of the alleged employee offences (e.g., theft, insubordination, absenteeism, poor performance), the strength of evidence against the employee, whether the employee claims illegal discrimination as well as unjust dismissal, and the presence of mitigating or exacerbating circumstances. Cases were presented for response to decision makers experienced as labour arbitrators, employment arbitrators, peer review panellists, HR managers in a non-union firm, and jurors with exposure to employment termination cases. A smaller sample of judges

also was included from other countries in which "for cause" standards are enforceable in the court system. Results are reported and discussed across all cases for all decision makers, and then though a detailed series of pair wise comparisons.

The findings with respect to employment arbitration are sobering. Employment arbitrators were less likely to overturn employment dismissals than any other group of decision makers. The fact that labour arbitrators and labour court judges from other countries were the most willing to rule in favour of employees is not terribly surprising. Labour courts often apply statutory or constitutional standards (summarized in a separate chapter on international perspectives) that require serious misconduct to justify dismissal, while labour arbitrators are likely to consider evidence of mitigating circumstances as part of a collectively bargained just cause standard. In addition, both sets of decision makers typically place the burden of proof on employers, a placement that should matter for cases in which the evidence against employees is plausible but less than conclusive.

More surprising are the authors' findings that employees fared worse under employment arbitrators than they did with peer review panellists or HR managers, decision makers who appear more beholden to their employers. The authors suggest possible reasons why these two sets of insiders might be better disposed toward dismissed employees on at least some occasions. Peers may be more likely than employment arbitrators to credit an employee's effective work history or to be lenient if the employee's recent problems are due to an external cause. Similarly, HR managers may be more supportive of the employee's position when the evidence is weaker or there is a suggestion of departure from the firm's procedures, based on their long-term interest in maintaining effective employee relations and consistency

of treatment, and also in avoiding legal disputes.

As for employees' greater success with jurors than with employment arbitrators, the authors' analysis suggests that jurors as non-professionals may be more likely to identify with workers, crediting the employees' assertions about evidence and also their mitigating circumstances. A missing piece, however, is a comparison with U.S. judges who often decide at a pre-trial stage various statutory or contract-related claims of unlawful termination. As professionals, these judges are more likely than jurors to have had personal experiences and training similar to employment arbitrators. They also are more likely than labour arbitrators and foreign court judges to rely on the same substantive standards that employment arbitrators apply. Including U.S. judges could have further advanced the book's purpose of assessing to what extent employees are free from unjust treatment.

The authors are appropriately cautious about various aspects of their findings. Still, their results and analyses may support a more serious critique of employment arbitration than they feel it is their role to proclaim in the instant setting. The Supreme Court has endorsed employment arbitration as capable of satisfying due process standards and fulfilling Congress's anti-discrimination purposes, but the book identifies multiple reasons for concern that employment arbitration procedures are subtly yet effectively stacked against employees. The authors also express shock that employees so often pay for the privilege of being mistreated in this process: their survey of arbitrators revealed that employees are covering all or a substantial part of arbitration costs in more than one-fourth of the cases.

The book's final chapter is entitled "Is Justice Weeping?": it is hard to escape the conclusion that the question is, by that point, purely rhetorical.

This thoughtful study should encourage further critical review as to whether employment arbitration is doing more to sanctify arbitrary or unjust employer treatment than to solidify job security

standards and processes for American workers.

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***Modernisation de l'État et gestion des ressources humaines,***

sous la direction de Louise LEMIRE, Denis PROULX et Luc COOREMANS, publié en coédition avec l'École nationale d'administration publique (Québec) et la Haute École Francisco Ferrer (Belgique), Outremont, Québec : Athéna éditions, 2005, 250 p., ISBN 2-922865-38-X.

Les temps sont au changement... Mais le changement sans sens n'est que mouvement. Alors l'impératif est mis au service d'une autre exigence : la modernisation. Changer pour être moderne. Cette injonction managériale frappe d'ailleurs tout aussi bien le monde de l'entreprise que celui de l'administration publique. Mais cette dernière, contrairement à l'entreprise, est réputée conservatrice, figée dans ses routines bureaucratiques. Cet ouvrage collectif rend compte de tentatives de modernisation de l'administration publique en Belgique et au Québec. *Modernisation de l'État et gestion des ressources humaines*, le titre de l'ouvrage souligne combien cette mutation de l'Administration doit passer par le changement du mode de management des femmes et des hommes, par des ruptures dans les pratiques de sélection, de nomination, de rémunération... Mais, dans un cas comme dans l'autre, le modèle qui inspire les réformateurs est celui de l'entreprise privée ; une entreprise privée idéalisée. Et ce décalage entre cette entreprise idéalisée et l'entreprise réelle est doublé d'un autre décalage, temporel cette fois. L'entreprise privée idéalisée des réformateurs est fréquemment l'entreprise d'hier...

Comme le souligne l'un des contributeurs, les référents culturels donnent sens aux mots et aux situations. Cette remarque vaut pour les employés de l'État comme pour les citoyens. Le chapitre consacré au renouvellement de la

fonction publique au Québec en est une bonne illustration. Face à la rareté des ressources financières, le Gouvernement veut concentrer les moyens de l'État sur ses missions essentielles. Mais quelle place a donc la fonction publique dans ces missions-là ? Chaque employé de l'État est en droit de savoir quel rôle le politique réserve à son Administration. Et l'on ne peut pas dire qu'en la matière les acteurs évoluent dans un monde de clarté ! Une telle réforme de recentrage sur les missions essentielles conduit nécessairement à des arbitrages d'autant plus difficiles à réaliser que la société québécoise reste convaincue que l'État doit pratiquer avec la société civile, chaque fois que les enjeux sont majeurs, une réelle concertation. Aussi, le gouvernement ne peut-il passer à la hussarde... Au-delà de la forme, une telle rupture rencontre quoi qu'il en soit également une forte opposition, et pas seulement parmi les fonctionnaires. Ainsi, la société québécoise est persuadée que, pour préserver ses caractéristiques particulières, elle a besoin d'un État agissant. L'idée d'un État maigre, replié sur ses seules fonctions régaliennes, ne s'imposera pas naturellement au sein de la population.

La modernisation de l'État compte parmi ses objectifs opérationnels le passage d'une gestion juridico-administrative à une gestion centrée sur les résultats et sur la qualité des services aux citoyens. Une telle réforme implique d'accorder une place centrale à la